

**No. 3:05-CV-467
(Phillips)**

Plaintiff opposes the motion, stating that the claims asserted in defendant's counterclaim are preempted by ERISA. At this juncture in the proceedings, the record does not contain sufficient information for the court to evaluate the merits of plaintiff's preemption claim. The issues raised by plaintiff are more properly considered on a motion for summary judgment.

Rule 13(f), Federal Rules of Civil Procedure, provides that when a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, the pleader may by leave of court set up the counterclaim by amendment. It appears to the court that this is such a case. Accordingly defendant's motion to amend counterclaim [Doc. 13] is **GRANTED**.

Inasmuch as defendant has now amended her pleadings to properly state a counterclaim against plaintiff, plaintiff's motion to dismiss defendant's counter-complaint [Doc. 9] is **DENIED AS MOOT**.

IT IS SO ORDERED.

ENTER:

s/ Thomas W. Phillips
United States District Judge